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No. 00-716

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHIRLEY A. LANG, *et al.*,

Petitioners,

v.

KOHL'S FOOD STORES, INC. and
THE GREAT ATLANTIC TEA COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners seek a writ of certiorari or, in the alternative, a "GVR" in light of *Reeves v. Sanderson Plumbers, Inc.* ___ U.S. ___, 120 S.Ct. 2097 (2000). Noted for its rejection of the "pretext-plus" rule, *Reeves* also clarified the standard of summary judgment review by directing that courts must *disregard* evidence supporting the moving party if it is either contradicted or impeached. 120 S.Ct. at 2110. This explicit directive was clearly not followed by the court below, which *credited* decision-maker Dan Daley's testimony supporting respondents' position that the challenged wage decisions were motivated by differences among the jobs at issue, when that testimony should have been *disregarded* because it was impeached by untruths and contradicted by admissions suggesting that the job differences were *not* the motivation for the wage decision. *See infra.* Had the court analyzed the record as required by *Reeves* (rather than affirming the district court ruling without analysis at all), it would have reversed the district court and remanded the Title VII claim for a trial by jury.

I. Respondents' Waiver Argument Is Groundless

Petitioners argued throughout the appeal proceedings that the wrong standard of review was applied. (Brief of Plaintiffs-Appellants at 28-34; Reply Brief of Plaintiffs-Appellants at 2-14) This Court's clarification of the standard in *Reeves*, decided ten days before the opinion below, made petitioners' argument airtight.

Respondents argue nonetheless that petitioners waived their right to rely on *Reeves* because they did not cite the decision to the court of appeals. However, this Court granted a GVR under virtually identical circumstances in *Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company*, 520 U.S. 893 (1997), where an important state court decision issued shortly before the court of appeals opinion was unknown

to the petitioner until after his rehearing petition was denied.[1] While the petitioner had attempted a "second" petition asking the court to recall its already issued mandate based on the state court decision, the motion was denied as "without merit." 520 U.S. at 895. This was most likely, according to this Court's opinion, because the court of appeals lacked jurisdiction to consider it. *Id.* at 896-97.

Respondents in the present case do not argue that petitioners could have acted in the court of appeals after their rehearing petition was denied. (*See* Opp. at 7-8, ending "window" for filing supplemental petition with the court's order denying petition for rehearing.) Hence, petitioners are in no different position from the petitioner in *Lords*. As there is no basis for believing that *Reeves* was considered or applied below, the relief petitioners seek should be granted.

II. Petitioners Are Not Seeking Mere Fact Review

Respondents' contention that the petition seeks mere fact review is wrong. Petitioners challenge the lower court's failure to analyze the record as required by *Reeves*.

That the court of appeals affirmed the district court without making its own analysis does not make the standards announced in *Reeves* less binding. Indeed, by simply adopting the district court's conclusion that petitioners' pretext evidence was "not persuasive," the court of appeals credited testimony it should have disregarded under *Reeves* and ignored evidence it should have considered.[2]

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[1] In the present case, petitioners were also unaware of the standard-of-review holding in *Reeves* until after their rehearing petition was denied.

[2] Notably, the Opposition persists in respondents' perennial mischaracterization of petitioners' burden. That is,

Respondents do not defend (or even identify) the standard of review applied by the court below. There was none. Rather, they argue the facts in an attempt to demonstrate that Daley's testimony was not contradicted or impeached, and that it was therefore properly credited as the basis for the court's ruling. Given this position, petitioners use this Reply to identify the contradictions and impeaching evidence with specificity (as this Court also did in the *Reeves* opinion itself) *not* because they seek a reevaluation of facts, but merely to establish precisely why Daley's testimony should have been disregarded.

III. Daley's Asserted Reasons For The Wage Gap Were Contradicted And Impeached By His Own Admissions

The lower court's rejection of the Title VII claim turned on Daley's justification for maintaining the wage gap. That justification had two essential components. First, Daley identified differences among the produce, bakery and deli jobs in revenues, independent judgment and lifting. Second, he asserted that these differences were the reason for respondents' wage decisions. This second proposition was essential to respondents' defense since, even if the jobs were not different,[3] the asserted

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respondents' Question Presented for Review suggests that petitioners had to "demonstrate" that the asserted justifications were pretext (Opp. at i); and their Opposition argues that petitioners had to "establish" that the justifications were unworthy of credence. (Opp. at 15) Petitioners were not required to demonstrate or establish pretext to avoid summary judgment, however, but merely to raise an issue of fact for the jury.

[3] Respondents' argument about the closeness of petitioners' *prima facie* case on the equality of the jobs is a red herring, since it was not required that the jobs be equal for petitioners to sustain their Title VII claim. Bound by the jury's

differences are no defense under Title VII, 42 U.S.C. § 2000e, unless they actually motivated the wage decisions.

It was this second proposition that was contradicted and impeached, in that petitioners' presented substantial evidence that the differences were *not* in fact considered by respondents when they set wages: *i.e.*, evidence that the job differences were not developed until after the wage negotiations were completed, evidence that the particular differences were not actually factored into the wage-setting process, and evidence that no link between the job differences and the wage decision was ever documented.

1. Regarding the *post-hoc* character of Daley's justifications, Daley testified:

> Q. When was the first time you ever articulated these three reasons as the reasons?
>
> A. After it was presented to me during the '95 negotiations . . . I started to put it together after the fact.
>
> Q. . . . So before that you had not put it together, is that fair to say?
>
> A. That's correct.
>
> . . .
>
> Q. And before that you had never told anybody that these were the reasons, is that correct?
>
> A. No.

---

verdict in the Equal Pay Act case, petitioners make their case for intentional discrimination by the direct method of proof under *County of Washington v. Gunther*, 452 U.S. 161, 178-81 (1981), which established that Title VII barred wage differences between *dissimilar* jobs as long as they were based on the employees' gender. Petitioners' evidence of pretext is "simply one form of circumstantial evidence [along with petitioners' other evidence] that is probative of intentional discrimination." *Reeves*, 120 S.Ct. at 2108.

> Q. No, you had not told anybody?
>
> A. No, I had not told anybody before that.

R. 215 at 232; and:

> Q. . . . you testified just a while ago that you really put together the reasons after the 1995 negotiations?
>
> A. That's correct. But I did have my experience before then.
>
> Q. But you never used that experience to determine what the wage rate was, had you?
>
> A No.

Id. at 254-55. As respondents concede (Opp. at 16), Daley never told anybody in management – including any of his colleagues on the negotiating team – about the reasons for the wage gap. (*Id.* at 232-35) Indeed, contrary to respondents' claim, Daley did not testify that he "discussed the relative contributions of the various departments with lead negotiator John Rogers." (Opp. at 16) All he was able to say was that he "may have" said "something to this effect" to Mr. Rogers. (R. 215 at 233-34) In fact, Daley admitted that he did not discuss the three reasons for the wage gap with Mr. Rogers. *Id.*

2. Daley also made a series of admissions suggesting that the asserted job differences were *not* considered when wages were set.

a. Regarding the employees' exercise of independent judgment, for example, he testified:

> Q. What part of the pay disparity between produce managers and clerks is attributable to the fact that you believe that they use more independent judgments than deli or bakery clerks?
>
> A. I have no part of the disparity that I would associate with that.

Id. at 246.

b. Regarding the employees' relative contribution to revenues, Daley admitted that throughout the stores in

general, wages were *not* tied to the revenues a department generated (R. 198 at ¶ 205); and, when asked, "Why do you think it makes sense to pay employees whose departments generate more revenues, more money per hour?" Daley answered:

> A. I have no thoughts on that at all.
>
> Q. None at all?
>
> A. None at all.

Id. at 238.

c. Regarding product volume, Daley testified:

> Q. [H]ow is the fact that produce departments . . . move more product factored into the wage rate that they receive?
>
> A. It's not part of the factor [sic].

Id. at 271.

d. Regarding lifting, Daley testified:

> Q. [W]hy is it a reason to pay someone more because they lift more weight?
>
> A. It takes more physical effort.
>
> Q. And is that a factor that you have used throughout the store?
>
> A. No.
>
> Q. Are there other positions where people are paid more because they lift more weight than other people in the store?
>
> A. No.

Id. at 252-53.

Finally, Daley admitted that respondents had no documents "reflecting that these [differences] are actually the reasons for the pay disparity." (*Id.* at 235) Respondents miss the point in responding that many documents were produced that reflected differences among the jobs in sales, profits, weights, etc. (Opp. at 16) The issue is not whether there were differences among the jobs (as the jury found there were), but whether such differences

motivated the wage decisions. Undisputedly, there are no documents linking the differences to the wage decisions. *See Reeves*, 120 S.Ct. at 2111. (distinguishing documents evidencing inaccurate record keeping from evidence that the inaccurate documents were intentionally falsified)

In addition, petitioners impeached Daley's credibility by demonstrating material untruths in his explanation of the wage gap. ("A factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'." *Reeves*, 120 S.Ct. at 2108; *id.* at 2112 (Ginsburg, J., concurring) Whether, as respondents argue, the misrepresentations were the result of innocent error was a question of interpretation for the jury, not the court. That they were not material is simply wrong.

The first of the misrepresentations was Daley's testimony that the unions did not demand wage equalization until 1998 – when in fact the unions did so in every bargaining proposal since 1992. (Compare R. 178 at ¶201 and R. 217 at ¶¶57-61.) Contrary to respondents' claim, this was not merely an error in timing. Daley's testimony plainly suggested and respondents' brief to the court of appeals (at 8) explicitly stated that the unions' putative acceptance of the wage gap was *a reason* why wages were not equalized.

The second misrepresentation was Daley's explanation of the wage gap as the product of neutral market forces in the 1960s. The real story of the wage gap's origins was far from gender-neutral. (*See* Petition at 5, describing the explicitly discriminatory job classification and wage scheme respondents negotiated during those years. R. 305 at ¶¶ 1-2, R. 217, Exs. 1-3) A jury could have reasonably inferred – from Daley's self-serving and inaccurate account of the history of the wage gap – that his explanations for maintaining it in the 1990s were not credible.

Thus contradicted and impeached, Daley's testimony should have been disregarded as a basis for summary judgment under *Reeves*.

IV. Petitioners' Steering Evidence Should Not Have Been Ignored

A substantial portion of respondents' brief is devoted to respondents' attack on petitioners' steering evidence – which the court of appeals opinion states was never offered, even though, as respondent concedes, petitioners "repeatedly put this evidence before the district court and the Seventh Circuit and called specific attention to it when they sought reconsideration/rehearing in both courts . . . " (Opp. at 9)[4]

The steering analysis was indeed "real" evidence of job steering during the 1990s. (*See* Opp. at 12) Focussing on where respondent had placed hundreds of applicants who had not specified a preferred position in either bakery, deli, or produce in their applications, the analysis revealed stark disproportions by gender. That is, respondents had placed 82% of the women who did not request any of the jobs, as compared to 34% of the men, in bakery and deli; and it had placed 47% of the men, as compared to 3.7% of the women, in produce. (R. 196, Ex. 6, Table 2) This disproportion far exceeded the traditional 80% rule. (R. 305 at ¶1) Thus, though they did not address what happened to those few women who were bold enough to

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[4] Petitioners never acknowledged that their evidence was not probative. Their decision not to appeal from the dismissal of their individual claims or the district court's refusal to certify the steering claim was based on other factors. As stated in the Petition (at 7, n.3), the named plaintiffs were all hired long before the actionable period. At most, they could claim that they were discouraged from seeking transfers to produce, but they were not well-positioned to pursue the classwide steering claim the district court had declined to certify.

ask for jobs in produce, petitioners' data were powerful evidence of respondents' attitude that the women belonged in the lower paying deli and bakery jobs.

Respondents contend that the analysis was properly rejected because it did not account for the possibility that some applicants requested jobs outside the written application or the uncertainty over which jobs were open when the applications were made. While the district court accepted this argument, it was contrary to this Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), which holds that a statistical analysis should not be excluded from evidence merely because it addresses fewer than all possible variables – particularly where the effect of the "missing variable" is speculative, as it was here. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) Respondents presented no evidence either that any woman in the three years covered by the data ever asked for a job in bakery or deli, or that only bakery and deli jobs were available when the women applied, while produce jobs came vacant only when the men applied. Given the stark disproportions the data revealed, the possibility that these "missing variables" would explain them away was too remote to defeat summary judgment.[5]

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[5] Respondents' counter-facts (Opp. at 14-15) do not support the lower court either. Even if they were accurate (and petitioners demonstrated below they were not, Appellants' Reply Brief at 9-11), they would at most provide the basis for arguments to the jury at trial. They do not entitle respondents to inferences in their favor at the summary judgment stage, nor deprive petitioners of the right to *their* inferences. *See Reeves*, 120 S.Ct. at 2111, citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (counter-evidence that workforce is racially balanced, while "not wholly irrelevant," was not "sufficient to *conclusively* demonstrate that [the employer's] actions were not discriminatorily motivated.") (emphasis in original).

CONCLUSION

The decision below plainly abrogated the standards for summary judgment review established by the Court, did not consider this Court's emphatic clarification of those standards in *Reeves*, and would have reached a different conclusion if it had. Accordingly, for all the reasons set forth in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted or, in the alternative, the matter remanded for reconsideration in light of *Reeves*.

Respectfully submitted,

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